BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN PROCTOR	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 253,659 & 259,541
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 17, 2003 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on December 16, 2003.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Eric T. Lanham of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The parties agreed claimant injured his left upper extremity on February 20, 1998, while working for respondent. That accident is the subject of Docket No. 253,659. The parties also agreed claimant injured his low back and possibly his right ankle on October 25, 1999, while working for respondent. That accident is the subject of Docket No. 259,541.

In the June 17, 2003 Award, Judge Avery awarded claimant benefits for a 24 percent permanent partial disability to the left arm for the February 20, 1998 accident. For

the October 25, 1999 low back injury, Judge Avery awarded claimant benefits for a 71.5 percent permanent partial general disability after finding claimant sustained a 93 percent wage loss and a 50 percent task loss.

Respondent and its insurance carrier contend Judge Avery erred. They do not challenge the benefits awarded for the left arm injury. But they challenge the award the Judge entered for the low back injury as they contend claimant did not prove that he has made a good faith effort to find appropriate employment. Accordingly, they request the Board to decrease claimant's wage loss to 57 percent by imputing a post-injury wage of $12 per hour, or $480 per week. They also request the Board to decrease claimant's task loss to 36 percent based upon the opinions expressed by vocational expert Gary Weimholt and Dr. Chris Fevurly. In summary, respondent and its insurance carrier request the Board to decrease claimant's permanent partial general disability from 71.5 percent to 47 percent.

Conversely, claimant requests the Board to increase the permanent disability award for the left arm injury from 24 to 32 percent based upon the rating provided by the treating surgeon, Dr. Lynn D. Ketchum, whom claimant contends has provided the more qualified opinion regarding impairment. For the low back injury, claimant contends that he has made a good faith effort to find appropriate employment and, therefore, requests the Board to find that he sustained a 95 percent wage loss. Claimant also contends the task list prepared by his vocational expert, Dick Santner, is more accurate than Mr. Weimholt's and, therefore, the Board should adopt the 67 percent task loss opinion provided by Dr. Peter Bieri. Accordingly, claimant requests the Board to find that claimant sustained an 81 percent permanent partial general disability as a result of the October 1999 back injury.

The issues before the Board on this appeal are:

1. What is the nature and extent of injury and disability for claimant's February 20, 1998 left arm injury?

2. What is the nature and extent of injury and disability for claimant's October 25, 1999 injury to his low back and right ankle? In addressing that question, the Board must decide the issues of whether claimant has made a good faith effort in seeking appropriate employment and what wage and task losses claimant sustained as a result of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and after considering the parties' arguments, the Board finds and concludes the June 17, 2003 Award should be modified.

Docket No. 253,659

There is no question that claimant injured his left upper extremity on February 20, 1998, as a result of the work that he was performing for respondent as a package car driver. The only issue for this accident was the extent of claimant's functional impairment.

As indicated above, the Judge determined claimant sustained a 24 percent functional impairment to the left arm due to his February 20, 1998 accident. That rating is an average of the 32 percent functional impairment rating to the left upper extremity provided by Dr. Lynn D. Ketchum, who treated claimant's left arm, and the 16 percent functional impairment rating to the left upper extremity provided by Dr. Michael J. Poppa, who evaluated claimant at respondent and its insurance carrier's request. Both doctors rated claimant utilizing the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.), as required by the Workers Compensation Act.[1]

Judge Avery carefully considered the doctors' testimonies regarding their ratings and consequently concluded that neither doctor's rating was more persuasive than the other doctor's. The Board finds no reason to disturb the Judge's finding and, thus, adopts it as its own.

Docket No. 259,541

The parties stipulated that on October 25, 1999, claimant injured his back while lifting a heavy box. The parties also stipulated that claimant's accident arose out of and in the course of his employment with respondent. The only issue presented to Judge Avery was the nature and extent of claimant's injury and disability. And the Judge determined claimant sustained a 93 percent wage loss and a 50 percent task loss for a 71.5 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Respondent and its insurance carrier initiated this appeal to contest the 71.5 percent work disability. As argued on page 7 of their brief to this Board and at oral argument to the Board, respondent and its insurance carrier contend claimant has sustained only a 57 percent wage loss and a 36 percent task loss, or a 47 percent work disability, as a result of the October 1999 back injury.

[1] See K.S.A. 1997 Supp. 44-510d and K.S.A. 1997 Supp. 44-510e.

Functional impairment

Three doctors testified concerning the functional impairment rating for the injuries that claimant received as a result of the October 1999 injury. Dr. Chris Fevurly, respondent's company physician who treated claimant's back, diagnosed claimant as having degenerative disc changes between the third and fourth (L3-4) and between the fourth and fifth (L4-5) lumbar discs with intermittent right-sided L4 radiculopathy. Dr. Fevurly determined claimant had a 10 percent whole body functional impairment according to the AMA *Guides* (4th ed.) due to the low back injury. The doctor did not attempt to rate the right ankle as he left that task to the specialist who treated claimant's ankle. But that specialist's opinion, however, was not obtained.

The second opinion was by provided by Dr. Michael J. Poppa, who evaluated claimant in March 2003 at respondent and its insurance carrier's request. Dr. Poppa determined claimant had a five percent whole body functional impairment pursuant to the AMA *Guides* due to the back injury. But the doctor did not find any functional impairment due to the right ankle.

The last functional impairment opinion was provided by Dr. Peter Bieri, who evaluated claimant in November 2002 at Judge Avery's request. Dr. Bieri concluded claimant had sustained an 11 percent whole body functional impairment due to the low back and right ankle injuries according to the AMA *Guides*.

The Board finds that Dr. Bieri was hired as a neutral physician and his opinion is persuasive. Accordingly, the Board adopts Dr. Bieri's functional impairment rating as its finding. Therefore, as a result of the October 1999 accident, claimant sustained permanent impairment to his low back and right ankle which constitutes an 11 percent whole body functional impairment.

Permanent partial general disability

Because claimant injured his low back and his right ankle as a result of the October 1999 accident, his permanent partial general disability benefits are governed by K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the**

> **accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The Kansas Court of Appeals in *Watson*[5] also held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

Wage loss

The Award indicated the parties stipulated claimant's average weekly wage for the October 1999 accident was $1,117.62 per week. At the time of the March 2003 regular hearing, claimant was working part-time at a friend's bar and grill checking identification. According to claimant, he mostly works weekends, earns $6 per hour and works 10 to 15 hours per week. That is the only work that claimant has performed since last working for respondent in December 1999.

Claimant is now in his early forties and has an associate degree. Claimant has spent a significant portion of his working life with respondent, where he worked for over 14 years. Claimant's active back treatment ended in late July 2000, when Dr. Fevurly determined claimant's back was at maximum medical improvement. Claimant, however, was continuing to receive medical treatment for his left wrist and arm as Dr. Ketchum performed several operations on claimant's left wrist after July 2000. In April 2002, Dr. Ketchum released claimant from medical treatment with no restrictions.

Claimant has persistently sought to return to work for respondent. But due to claimant's back condition, respondent refuses to permit claimant to return. The company physician, Dr. Fevurly, examined claimant on April 18, 2002, and concluded claimant was not physically qualified to return to work as a package car driver. On April 30, 2002, claimant saw Dr. Robert R. Brown, who also concluded that claimant should not return to work for respondent as a package car driver. Claimant requested an accommodated position from respondent. But by letter dated September 6, 2002, respondent refused.

Unquestionably claimant has made a good faith effort to return to work for respondent. But claimant's efforts to find work with other employers are somewhat nebulous. Claimant testified to nine potential employers where he had applied for either sales or delivery jobs. Claimant testified that he had faxed his resume to some potential employers and had responded to some newspaper ads. But the record does not provide an estimate of the number of times. Claimant testified that he was registered at the

[6] *Id.* at Syl. ¶ 4.

unemployment office. But the record is vague whether he regularly checked with the unemployment office regarding job openings. Moreover, claimant testified at the March 2003 regular hearing that he had not put in a job application since January 2003 with G and K Supply and the time before that was in December 2002 with FedEx Ground.

The Board concludes that clamant has failed to prove he made a good faith effort to find appropriate employment following his April 2002 medical release. Accordingly, the Board imputes a post-injury wage of $8 per hour, or $320 per week, in light of the testimony provided by claimant's vocational expert, Dick Santner, and respondent and its insurance carrier's vocational expert, Gary Weimholt.

Comparing the pre-injury weekly wage of $1,117.62 to the post-injury weekly wage of $320, claimant has a 71 percent wage loss for purposes of the permanent partial general disability formula.

Task loss

Two doctors testified regarding claimant's task loss due to the October 1999 accident. Dr. Bieri, who believes claimant can perform light to medium work, reviewed the list of former work tasks prepared by Dick Santner and indicated claimant should not perform four of the six tasks, or 67 percent. On the other hand, Dr. Fevurly, who believes claimant should not lift more than 50 pounds and should not repetitively bend or stoop, reviewed the list of former work tasks prepared by Gary Weimholt and determined claimant should not perform four of the 14 tasks, or 29 percent.

Claimant challenges the work tasks identified by Mr. Weimholt as those performed by claimant in the 15-year period before the October 1999 accident. Claimant argues that Mr. Weimholt artificially inflated the number of work tasks to deflate claimant's task loss percentage. And respondent and its insurance carrier challenge the work tasks listed by Mr. Santner as they contend he artificially deflated the number of tasks to inflate claimant's task loss percentage.

The Board is not persuaded that either task list is significantly more accurate than the other. Moreover, the Board concludes claimant's task loss falls somewhere between the 67 percent task loss opinion provided by Dr. Bieri and the 29 percent task loss opinion provided by Dr. Fevurly and finds claimant has a 48 percent task loss for purposes of the permanent partial general disability formula.

Work disability

As required by the permanent partial general disability formula, claimant's 71 percent wage loss is averaged with the 48 percent task loss, which creates a 60 percent

work disability for the October 1999 accident. Although claimant's work disability is decreased to 60 percent from the 71.5 percent determined by the Judge, the total amount of disability compensation does not change as claimant remains entitled to receive the maximum weekly permanent partial general disability benefit until $100,000 is paid in both temporary total and permanent partial disability benefits. The June 17, 2003 Award should be modified, however, to correct the Judge's computation for the October 1999 accident.

The Board adopts the Judge's findings and conclusions to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the June 17, 2003 Award, as set forth below:

Docket No. 253,659

The Board adopts the Judge's findings and conclusions that claimant is entitled to receive 126.39 weeks of temporary total disability benefits and 20.07 weeks of permanent partial disability benefits, totaling $51,407.80, for the February 20, 1998 accident and that the entire award is due and owing, less any amounts previously paid.

Claimant may apply for additional medical benefits as provided by the Workers Compensation Act.

The Board adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

Docket No. 259,541

John Proctor is granted compensation from United Parcel Service and its insurance carrier for an October 25, 1999 accident and resulting disability. Based upon an average weekly wage of $1,117.62, Mr. Proctor is entitled to receive 34.76 weeks of temporary total disability benefits at $383 per week, or $13,312.48, plus 226.34 weeks of permanent partial general disability benefits at $383 per week, or $86,687.52, for a 60 percent permanent partial general disability and a total award not to exceed $100,000.

As of December 22, 2003, Mr. Proctor is entitled to receive 34.76 weeks of temporary total disability compensation at $383 per week in the sum of $13,312.48, plus 182.29 weeks of permanent partial general disability compensation at $383 per week in the sum of $69,817.07, for a total due and owing of $83,129.55, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of

$16,870.45 shall be paid at $383 per week until fully paid or until further order of the Director.

Claimant may request additional medical benefits as provided by the Workers Compensation Act.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director